APPEAL NO. 93305

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On February 12, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer). presiding as hearing officer. The record was closed on February 26, 1993. The issue to be resolved at the CCH was: "Did the Claimant sustain an injury in the course and scope of his employment with the City on or about (date of injury)." The hearing officer determined that the respondent, claimant herein, was injured in the course and scope of his employment with the (employer) on or about (date of injury). Appellant, the (employer), herein City, contends that the hearing officer misapplied the facts, the law, and the argument presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Finding that the law and the evidence do not support the decision reached by the hearing officer, we reverse and render a new decision that claimant did not sustain a compensable injury.

Claimant had worked for the City as a fire fighter. Because of a change in contractual relations for fire fighting coverage, claimant was transferred by the City to its new Alliance Airport (airport) as a security guard in January 1992. Claimant testified he worked alone three days a week (Monday, Thursday and Saturday) at the airport main gate from 7 p.m. to 7 a.m. Claimant stated he was assigned a position 150 feet from the terminal building within view of the gate. It was the uncontradicted testimony of both parties that claimant was assigned a 1991 S15 GMC Blazer vehicle to provide both shelter and access to communications and that the vehicle had three radios for communication. There were some contradictions in testimony but generally it was agreed that claimant could move around, and go into the terminal to use the restroom and to eat. The City's witness testified that some of the security guards had the doors and/or windows of the vehicle open, the air conditioner on, and moved around the vehicle. The testimony was that the security guards were only required to remain within eyesight of the gate and in radio contact.

Claimant testified that in early April he began experiencing pain in his right shoulder and went to see his primary care physician, (Dr. F), at the (clinic). Shortly thereafter, claimant states his lower back began bothering him and he returned to the clinic on May 23rd and saw (Dr. A), in Dr. F's absence. Dr. A took claimant off work until May 26th and noted "back strain" on the work release slip. Claimant returned to see Dr. F on May 26th and Dr. F gave claimant a work release slip stating claimant "may not sit in truck for long periods of time until further notice." On June 1st, claimant returned to duty and discussed his back strain with (Mr. C), claimant's supervisor. Mr. C modified claimant's duties allowing claimant to monitor the gate from a window in the terminal. Dr. F continued treatment but at some point referred claimant to (Dr. K), an orthopedic specialist. An MRI scan was done

and Dr. K in a report dated November 23, 1992, diagnosed "Spondylolisthesis: Acquired." A prescription pad note dated "Sept. 4, 92" notes "Spondylolisthesis L5 ‘spine’ ‘slippage’." The claimant transferred care to (Dr. W), a chiropractor on October 1st when claimant was laid off in a reduction in force due to City budgetary constraints.

Claimant testified he is 6'2" tall and weights about 250 pounds. Dr. F's medical records indicate that claimant had gained about 20 pounds in the year before his injury. Claimant concedes Dr. F had put him on a diet and wanted him to lose weight. Dr. F's progress note of 6-8-92 states claimant "[h]as gained 20 lbs. since 1 yr. due to inactivity which is definitely aggravating his shoulder & L/S strain."

Mr. C, claimant's supervisor testified for the City. A portion of Mr. C's testimony was that he (Mr. C) was 6'4" tall (two inches taller than claimant) and weighed 240 pounds, which is about what claimant weighed during the time he performed the security duties out of the Blazer. Mr. C testified he had sat in the vehicle and experienced no problems and that four other security guards using the vehicle had not had any complaints about discomfort. Mr. C testified the seat of the vehicle could be adjusted and that he would rate the vehicle as "50/50" on mobility while sitting in the vehicle (with 100 being maximum mobility and 0 being minimum mobility). Mr. C's testimony was that personnel involved in security duty were free to get in or out of the vehicle as long as they were within sight of the front gate and were able to maintain radio contact.

Dr. W submitted several reports. In a report dated November 21, 1992, Dr. W states "[t]he fact the patient is six foot four inches (sic claimant testified he is 6'2") and weight 278 pounds and was required to sit for long periods of time in a truck too small to accommodate someone his size is what cause (sic) [claimant's] back injury." We would note that claimant stated he weighed 250 pounds and that Dr. F's records only show him weighing 247 pounds on 7-6-92. Either Dr. W's report is in error regarding claimant's weight or claimant has gained an additional 30 pounds between July 6th and November 21st.

Dr. F, in a narrative report dated July 29, 1992, to the City's adjustor noted that claimant thought his back pain was "aggravated" by sitting in a truck at work. Dr. F notes that claimant has poor posture ". . . and that with repeated movement testing, the patient had decreased symptoms of stiffness and pain." Dr. F also notes that she was first aware that claimant's condition was the subject of a workers' compensation claim on July 24th when the City's adjustor contacted her.

The therapist at the Back and Neck Clinic also noted that claimant ". . . had very poor posture sitting . . . . With repeated movements testing [claimant] had decreased symptoms with prone positioning and prone on a wedge."

The City points out, and it is not denied by claimant, that claimant commuted by car

between Wichita Falls where he lives and the airport in Fort Worth where he worked. There was no direct evidence of the distance between Wichita Falls and Fort Worth.

The hearing officer determined in pertinent part:

FINDINGS OF FACT

4.[On or about (date of injury)], the Claimant sought medical treatment as a result of the increasing severity of symptoms he had been.

experiencing for the past few weeks as a result of being required to sit in his assigned vehicle for long periods of time.

5.The Claimant sustained an injury to his back as a result of repetitive trauma caused by having to sit for long periods in his vehicle.

6.Although he continued his employment with the city after experiencing the symptoms mentioned above, the Claimant was assigned to the terminal building as of June 1, 1992, and was unable to return to his regular work during the remainder of his tenure with the City.

7.The Claimant was laid off by the City on October 1, 1992 for reasons unrelated to his injury.

8.As of (date of injury), the Claimant was unable to obtain and retain employment as a security guard, or any similar employment, as a result of the repetitive trauma injury he sustained while working for the City.

CONCLUSIONS OF LAW

2.The Claimant was injured in the course and scope of his employment with the City on or about (date of injury).

3.The Claimant has had disability for eight or more days as a result of an injury he sustained on or about (date of injury).

First we would note that the hearing officer made several findings of fact and one conclusion of law regarding disability, although that was not an announced or agreed upon issue. Furthermore, the findings regarding disability are inconsistent within themselves (i.e. Finding of Fact No. 8 states claimant had disability, as defined by the 1989 Act "as of (date of injury)" while in Finding of Fact No. 6, the hearing officer states claimant "continued his employment with the City"). The undisputed fact was that claimant returned to his regular security guard

functions on June 1st, performing those functions from the terminal building, until he was laid off in a reduction in force on October 1st. Consequently the findings and conclusion regarding disability are both erroneous and unnecessary.

The City, in its closing argument, referred to Texas Workers' Compensation Commission Appeal No. 92272 decided August 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92340, decided September 3, 1992, cited the similar fact situations and argued that sitting, under the facts of this case, is not covered as a repetitive trauma injury under the 1989 Act. The hearing officer, referring to the Appeal Panel decisions stated "I'll read those." If the hearing officer did so, he made no effort to distinguish those cases or the case law cited therein, from the instant case. The City in its appeal reurges consideration of those Appeals Panel decisions, cites several prominent cases involving repetitive trauma injuries, and argues that sitting in an automobile ". . . as being repetitious, physically traumatic activity is a type of activity that was not contemplated by . . .Article 8308-1.03(39)." We agree, although we do note that there is a concurring opinion in Appeal No. 92272, by Appeals Judge Kelley, which states that she ". . . would not reject out of hand the possibility that a repetitive trauma injury could result from sitting."

Appeal No. 92272, *supra*, involved an employee who contended that extra long hours, with few breaks, seated on "old, worn-out, secretarial chairs with little or no back support" in front of a computer screen, contributed to his low back problem and that the low back problem constitutes a cumulative or repetitive trauma injury. The Appeals Panel affirmed the hearing officer who found that the employee in that case had not sustained a compensable injury. A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). "Injury" means "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm," and includes occupational diseases. Article 8308-1.03(27). The term "occupational disease" includes repetitive trauma injuries which means "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Article 8308-1.03(36) and (39).

In Appeal No. 92272, *supra*, we noted that in order to recover workers' compensation benefits for a repetitive trauma injury the claimant is not required to prove that the injury was caused by an event occurring at a definite time and place. In the present case, as in Appeal No. 92272, claimant does not claim that his back problem occurred at a definite time and place, but instead claims that he sustained a cumulative or repetitious type of injury to his back as a result of sitting in a vehicle, or as in 92272, in old, worn-out uncomfortable chairs. In Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App. Houston [14th Dist.] 1985, writ ref'd n.r.e.), the court said that in order to recover for a repetitive trauma injury one must not only prove that repetitious, physically traumatic activities occurred on

the job, but also prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. In Davis, the claimant, a flight attendant, testified as to the repetitious, physically traumatic activities inherent in her job: handling heavy carts and trash containers, twisting into awkward positions, and bending and twisting while trying to maintain balance in turbulent air. The claimant's doctor testified that these activities were reasonably likely to cause the claimant's pain, and that the activities were also a producing cause of her condition. In light of that evidence, the court held that the trial court abused its discretion in disregarding the jury's finding that the claimant suffered from an occupational disease and the trial court should not have granted judgement *n.o.v.* In Texas Employers Insurance Association v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied), a repetitive trauma injury case, the claimant and her coworkers described the bending, twisting, and other types of maneuvers required to operate the low ironing board the claimant worked on and testified as to the problems caused by the manner in which the claimant had to operate the pedal and twist to hang items. The court held that the claimant's testimony and that of her coworkers was sufficient to establish a causal connection between the specific activities of her work and her lower back condition. The court said that the condition was within the general experience and common sense of persons generally, so that it was appropriate to allow the jury to know or anticipate that the condition could reasonable follow the specific events. The claimant's doctor confirmed that the claimant's work activities could cause a ruptured disc and aggravate such a condition if she had such a preexisting condition. Another case cited by the City, and which is cited in Appeal No. 92272, is Standard Fire Insurance v. Ratcliff, 537 S.W.2d 355 (Tex. Civ. App. - Waco 1976, no writ), involved a repetitious physically traumatic activity of claimant's use of her right knee to press a lever.

The instant case is distinguished from Davis, Ramirez, and Ratcliff in that there is no evidence that claimant engaged in a repetitious, physically traumatic activity as found in the cited cases. Claimant sat for long periods of time in a Blazer vehicle. Claimant has not cited, nor have we found, any authority for the proposition that sitting, without more, constitutes repetitious, physically traumatic activities as contemplated by Article 8308-1.03(39). Appeal No. 92272 cites, and distinguishes, Texas Workers' Compensation Commission Appeal No. 92171, decided June 17, 1992, where an employee sustained a repetitive trauma injury to his back as a result of driving his employer's logging truck which had bad shocks and a poor suspension system and which resulted in the employee's back being continually "beat" and vibrated over a period of months.

In Appeal No. 92340, *supra*, the Appeals Panel reversed the decision of a hearing officer who found sitting constituted a repetitive trauma injury. In Appeal No. 92340, a dispatcher had lengthy shifts which necessitated long periods of sitting. The dispatcher's high back "lazy-boy" chairs were replaced with a new, allegedly more uncomfortable chair. The employee allegedly injured his back by repetitive sitting in the newer chairs. Citing

Davis and Appeal No. 92272, the Appeals Panel again noted ". . . no Texas case authority has been cited or found 'for the proposition that sitting in a chair at work, without more, constitutes repetitious, physically traumatic activities as contemplated by Article 8308-1.03(39)'." Appeal No. 92340 also cited Texas Workers' Compensation Commission Appeal No. 92314, decided August 28, 1992 where a claimed repetitive trauma injury to the back was not found to have been causally linked to prolonged sitting while driving a truck.

Both Appeal Nos. 92272 and 92340 recognize that to be compensable an employee's claim of repetitive, cumulative physically traumatic activity would still require that a causal connection between the employment and the injury be established. *See* Davis, *supra*, and Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43 (Tex. 1969). In the instant case, claimant attempts to make this connection through the medical report of Dr. W which states that claimant ". . . was required to sit for long periods of time in a truck too small to accommodate someone his size is what cause (sic) [claimant's] back injury." We have previously noted factual inaccuracies in Dr. W's report. We now further note that Dr. W apparently relied on claimant's representations as to the size of the "truck" and that it was too small for a person claimant's size. Dr. W was apparently unaware that a man taller and just as heavy as claimant found no problem with the vehicle. Dr. W also made no mention of claimant's weight, noted by Dr. F, as a factor in claimant's condition or the fact that claimant commuted by car between Wichita Falls, where claimant lived, and Fort Worth where claimant's job and doctors were. We further note the hearing officer, while making no findings of fact or conclusion of law regarding medical causation, states in his discussion, "[t]here's also substantial medical evidence supporting the claimant's position," citing (1) Dr. W's report (discussed above), (2) Dr. K's records indicating the claimant's condition was "acquired," and (3) the fact that Dr. F's work release slip said he should not sit in the vehicle "until further notice." We disagree that this amounts to "substantial medical evidence." Dr. K's reports merely state the spondylolisthesis was "acquired" without detailing how it was acquired or otherwise explaining that term. Dr. F, in July, knew claimant was making a workers' compensation claim, but still failed to comment, with reasonable medical probability, as to the cause of claimant's back condition other than to urge him to lose weight. As the City notes in its appeal, while Dr. F did advise claimant in May not to sit for long periods of time, that advice does not establish a causal connection, but only serves to show that based on claimant's symptoms, he should not be sitting for long periods of time.

As we said in Appeal No. 92340, *supra*, and repeat here:

> In the case before us we are simply unable to find sufficient evidence to sustain the decision of the hearing officer. The evidence does not establish the essential linkage between the claimed injury and the work activity nor does it establish that what the respondent was exposed to at work is anything more than 'an ordinary disease of life to which the general public is exposed outside of

employment'.

Accordingly, the decision is reversed and a new decision is rendered that claimant did not sustain his burden of proof that his sitting in a vehicle, without more, constituted a repetitious, physically traumatic activity as contemplated by the 1989 Act. Claimant is therefore not entitled to benefits under the 1989 Act.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Appeals Judge

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Philip F. O'Neill
Appeals Judge